IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 66/87

COR: The Hon. Mr. Justice Rowe, P.
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Forte, J.A.

R. v. GEORGE LINDO

Miss Janet Nosworthy & Mrs. Kathleen Nosworthy for the Appellant.

John Moodie & Miss Donaree Banton for the Crown.

2nd & 18th February, 1988

CAREY, J.A.:

After a trial on 26th, 27th and 30th March, 1987 in the St. James Circuit Court before Morgan, J., and a jury, the appellant George Lindo was convicted of the murder of one Audrey Hill and sentenced to suffer death in the manner authorised by law. He applied for leave to appeal his conviction and this Court, on the 2nd instant, treated his application as the hearing of the appeal which it dismissed. We then intimated that we would put our reasons in writing, and that promise is now being fulfilled.

Although the trial occupied some three (3) working days, the facts can be shortly stated: On 8th August, 1986 at about 7:15 a.m., the slain woman left home dressed in a black and white blouse, black "granny-print" skirt, and wearing red slippers and her watch, which had

a white band. She was seen by another witness for the Crown some time after that, walking along a road in the Paradise, Mango Walk area of Montego Bay in the parish of St. James. The appellant was seen at the same time walking ahead of Miss Hill. She did not return home after work at her accustomed time, and a search party was organized. It was not, however, until midnight or thereabouts that her body was located in some bush by a short-cut called "Wet Horse Hill", which is situated off the Norwood Road. Her clothes were disarranged in such a fashion as clearly suggested she had been sexually assaulted. When the police visited the scene, an officer turned the head, and according to one witness, when this was done, he observed a bloody area to the right of the head and beside it a stone, described as 'good sized'. The post-mortem was performed on 13th August when the body was in an advanced state of decomposition. The cause of death was strangulation. There were finger nail marks, multiple small linear lacerations to the front of the neck. No other signs of violence were observed on the body.

On 9th August, 1986 the appellant spoke with one Merris Elliott, a married woman who, shortly before that time, was on intimate terms with the appellant. He confessed to her that he had killed a woman because she had sent him to prison. He added that he hit her in the head, raped her and struck her six times in the chest with a stone. When she expressed her disbelief, he countered by enquiring how else he could have come in possession of her watch. Upon hearing this, Merris Elliott went to her daughter whom she had earlier that day sent to the appellant's home to collect a pair of shoes. She said that her daughter had returned with a watch. Having recovered that watch, she delivered it to the police where it was later identified as belonging to the victim. Now Mrs. Elliott's daughter testified that when she called at the appellant's home, she had seen the watch there and at her request he had allowed her to have

it. On the same date, Miss Elliott said he asked her to return a travelling bag for his clothes so that he could go away.

The appellant was arrested on 13th August. On the following day, he was interviewed by a senior police officer who administered the usual caution. In the course of this interrogation when he was shown the slain woman's watch, he enquired how the police came by it and was advised that they had got it from the woman to whom he had given it. Upon hearing this, he is alleged to have promised to make a clean breast of it. Thereafter, he dictated a statement which, in the event, was admitted in evidence. The purport of that statement was that Miss Hill whom he referred to as "Coolie Girl" had borrowed some $80.00 to contribute to a 'partner' transaction in which both were participants. She had not repaid him despite requests on his part. On the relevant day, both of them were walking along the road in conversation, when she suddenly ignored him and began cursing him. He flung a stone which hit her. He knew nothing after that.

Having unburdened himself, he promised to point out the location of the crime and where he had hidden the victim's shoes. He was as good as his word and even directed attention to the stone he said he had used. The slippers of the victim were recovered.

The appellant gave evidence on oath. He denied that he had met the slain woman on any track. He did not know her. He gave a watch to no one. He admitted going to Mrs. Elliott's home and demanding to know if her children were being sent to his home to take away everything he had. He also admitted requesting his travelling bag so that he could return to his girlfriend in Kingston, seeing that she had returned to her husband. He denied making any confession to her. He said he was beaten by the police and signed a statement when he could no longer endure the torture. He was never in any 'partner' transaction with any woman. He did not kill any woman.

The first ground of appeal which was contained in supplementary grounds in respect of which leave to argue was sought and granted, complained that the learned trial judge erred in failing to direct the jury on the "vital issue of provocation" which fairly arose on the prosecution's case. That failure, it was argued, deprived the appellant of a chance of acquittal on the charge of murder.

Miss Nosworthy drew our attention to the statement of the appellant which he gave the police under caution (page 132). We set it out fully:

> "..... me and 'Coolie Girl' in partner me go fi me draw and after me go - after me go fi mi draw only one person was left to come in, only she was left to put in her hand. After me get mi draw now, 'Coolie Girl' come to Miss Williams and tell her say she nuh have the money fi put in her draw. 'Coolie Girl' say to me, say, lend her a money because she nuh have any money. Before Miss Williams mi lend her $80.00 and tell her sey when she get money - fi her draw, she mus' mek mi get back the money. 'Coolie Girl' sey next month mi will get back the money. Mi see her two times ..... and ask her fi mi money, and all now mi no get it back.
>
> HER LADYSHIP: Just pause there a minute. Something is omitted from the type.
>
> WITNESS: Yes. Mi see her.
>
> HER LADYSHIP: Mi see her two times and ask her fi the money and all now mi nuh get it back yet. Yes.
>
> WITNESS: The other day mi see her a go down Paradise Road way, me and her was walking and was talking going down, after a sudden she just start to ignore and curse mi. Mi tek up a stone boss and me fling it and it lick her. From that me nuh know wha happen after that, mi just go whey and come back home."

As we understood the submission, provocation arose because "she ignore and curse me" and a fair reading of the entire statement shows that a "situation was building up between the appellant and the deceased."

Whatever might be the approach of a trial judge to provocation, a Court of Appeal is constrained to approach the matter in a

wholly different way. In R. v. Pennant S.C.C.A. 126/84 (unreported) 15th May, 1986, this Court approved the test adumbrated by Lord Devlin in Lee Chen Chuen (1963) 1 All E.R. 73. An Appellate Court must apply the test with as much exactitude as the circumstances permit, (p. 78) and it is no part of our function to attempt to tilt the balance in favour of the defence. We must, therefore, examine the circumstances to see whether the three elements to constitute provocation exist, viz., the act of provocation, the loss of self control, both actual and reasonable and the retaliation proportionate to the provocaiton. In the present case, apart from the purported conduct of the victim in not responding to conversation, no details are available with respect either to the nature or the extent of the "cursing". In our view, the material which we were invited to consider, does not qualify even as a provocative incident and provocation in law, it has been said, means much more than a provocative incident. The first element being non-existent, we have no hesitation in saying that the learned trial judge's failure to leave provocation to the jury, cannot, successfully, be impugned. This ground, therefore, fails.

There was some faint argument mounted by Miss Nosworthy that manslaughter on the basis of the absence of the required intent, should also have been left for the jury's consideration. She based this on the evidence of Merris Elliott, as to the confession which was made to her. She stated that the appellant told her that he had "used a stone to hit her (i.e. the deceased) in the chest", and therefore it was submitted, the inference to be drawn from the use of a stone, was that the appellant did not possess the necessary mens rea.

In our opinion, there is nothing in the point. As the learned trial judge observed at page 336 in declining to leave manslaughter when invited by counsel for the prisoner:

> "HER LADYSHIP: I could not do that because the doctor said that she died of strangulation and strangulation is a deliberate and intentional act, different from a stone throwing which can be deliberate but not intentional. There is no basis as I see for manslaughter."

Her reasoning far from being fallacious as it was stigmatized by Miss Nosworthy, was impeccable and we need to say no more in respect of that ground.

Learned counsel for the appellant in her next ground was highly critical of the learned trial judge's directions on the "vital issue of identification." It is appropriate to detail the respects in which it was sought to show that the directions were deficient:

> "(a) she failed to direct the Jury as to factors material to a proper identification of the Applicant in all the circumstances of the case
>
> (b) she failed to advise the Jury as to the necessity for caution in assessing the evidence relating to identity of the Applicant
>
> (c) she failed to warn the Jury of the danger of conviction of the Applicant if they found that the evidence relating to the identity of the Applicant was unsafe."

We would observe that identification was not a vital issue: it was at best peripheral. The witness called to identify the appellant had observed him on a track at the same time as the slain woman. The case for the prosecution depended essentially on the evidence of Merris Elliott with respect to the appellant's confession of the crime to her. But at all events, we are satisfied that the criticisms are entirely without a vestige of merit as the following extracts from the summing-up illustrate. At page 296 the learned trial judge stated as follows:

> "So, Mr. Foreman and members of the jury, you have to look at what opportunity he had to identify this accused man. This was 7:15 in the morning, it was broad daylight and he passed him within a foot. It is for you to say whether or not he didn't have sufficient opportunity to see him. Twice he said he passed him. Because, if he did not have sufficient opportunity to see him then, of course, he wouldn't be able to identify him after."

She cautioned the jury thus:

> "In all matters of identification you have to be very careful how the identification came to be made and two, how did the witness impress you. Did he impress you as a witness of truth or did he impress you that he was making it up, that he was lying about it? If he impressed you as a witness of truth and if you think that he is not lying, then you can accept his evidence."

Then she dealt with the suggestion made by the defence that the witness had been assisted by the investigating officer in identifying the appellant, in this way at page 297:

> "And then - so far as that is concerned, (i.e. the issue of identification) Mr. Foreman and members of the jury, you are to make up your mind whether or not he had sufficient opportunity to see him and if he had a sufficient opportunity to see him, whether or not you find that he was assisted by the police in identifying this man. But, you have heard what he has said and it is entirely a matter for you to decide. It is one of the issues on which you will have to make up your minds."

This was not a "fleeting glance" case: it was not the sort of situation contemplated in the definitive authority on this issue, viz., Oliver Whylie (1978) 25 W.I.R. 430. In the present case, the case for the prosecution did not depend wholly or substantially on eye-witness evidence. As we have previously commented in this judgment, it rested on a confession. On an issue which was of marginal relevance, we do not think that the learned trial judge was obliged to

say one whit more than she did. There was plainly no failure on her part, in the respects identified by learned counsel for the appellant.

It was next contended that the learned trial judge failed to give the jury any adequate directions on the law relating to practice and procedure in holding an identification parade and she further failed to relate the same to the evidence before the Court. As to this, there was never any issue at trial that the identification parade had been in any way tainted by impropriety. This was clearly recognized by the learned trial judge when she said at page 299:

> "So Mr. Foreman and members of the jury, there is no issue about the conduct of the parade."

It is plain that no directions were called for in the circumstances. One of the purposes of a summing-up is to identify the issues which arise and to give such directions as are necessary for a determination. It is no part of the judge's role in a criminal trial to give academic excursuses. A jury is concerned with "applied law" not "pure law".

Another submission made on behalf of the appellant related to the cautioned statement of the appellant. It was argued that the learned trial judge erred in ruling that it should be admitted in evidence. No criticism was made as to the learned trial judge's directions to the jury as to how they should assess its weight. The learned trial judge considered the question of the admissibility of the statement after conducting a voir dire. Allegations of torture on the part of the police officers against the appellant to induce him to confess were made but rejected by the learned trial judge. Her ruling that the statement was voluntary was consistent with the finding that "the accused is making up this story." Any other ruling would have been a wrongful exercise of her discretion. This ground has no merit.

We were finally invited by Miss Nosworthy on behalf of the appellant to say the trial was unfair, in that, the learned trial judge wrongfully admitted evidence, the prejudicial effect of which outweighed its probative value. In the course of recounting the appellant's confession, the witness Merris Elliott said the appellant explained that the motive for the killing was that Audrey Hill had sent him to prison. The fact that he had been sent to prison was identified as objectionable.

The motive for a crime is always admissible in evidence against an accused person. The impugned statement formed part of a confession which admitted that he had killed someone and explained the motive for that killing. It would be wholly illogical to rule out the reason for an admitted killing but, at the same time, to permit the reception of the fact of the crime. It should be pointed out as well that at the trial, no objection to its admissibility was made by counsel.

We think that every point that could possibly be taken on behalf of this appellant was valiantly made by Miss Nosworthy and we commend the moderation in her presentation. In the end, we were not persuaded that there was any reason to interfere with the verdict of the jury which, we think, was eminently justified on the facts.